IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

SA.No. 760 of 1994()

AS.52/1993 of ADL.SUB COURT, THALASSERY
OS.260/1991 of MUNSIFF COURT, THALASSERY
.....

APPELLANT: 2ND APPELLANT:DEFENDANT:

MANDOLI KRISHNAN,
S/O. KUNHIRAMUNNI, AAGAED 58 YEARS,
NO OCCUPATION, RESIDING AT THALASSERRY AMSOM,
VADIKKAKAM DESOM, THALASSERRY TALUK.

BY ADV. SRI.T.A.RAMADASAN

RESPONDENT:RESPONDENT:PLAINTIFF:

A.C.M.KUNHAMINA,
D/O.BAVACHI, AGED 61 YEARS,
NO OCCUPATION, THALASSERI AMSOM,
VADIKKAKAM DESOM, THALASSERY TALUK.

BY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 760 OF 1994

.....

DATED THIS THE 22nd DAY OF OCTOBER, 2007

JUDGMENT

Defendant in O.S.260 of 1991 before Munsiff Court, Thalassery is appellant. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for mandatory injunction directing appellant to cut and remove three coconut trees to prevent damages caused to the building in the plaint schedule property. The case of respondent is that she is the owner of the property and in possession of the building in R.S.7/95 of Thalassery Village and the property of the appellant is on the side of that property and there are three coconut trees therein which sland towards the plaint schedule house and due to the fall of coconuts from those trees, the beams and rafters and tiles of the building are being damaged and therefore respondent is entitled to a decree for mandatory injunction to remove the coconut trees.

2. Appellant filed a written statement contending that the building in the plaint schedule property is old and dilapidated and damage to the building was caused due to its old age and not due to fall of coconuts. It was contended that the coconut trees

are not causing any damage to the building and therefore respondent is not entitled to the decree sought for.

3. A Commission was taken out and the Commissioner submitted Ext.C1 report. Learned Munsiff, on the evidence of Ext.A1 and A2, Ext.B1 and Ext.C1 and oral evidence of Pws 1 to 3 and DW1, found that due to fall of coconuts from the three coconut trees standing in the property of appellant, damage was caused to the tiled building in the plaint schedule property. Relying on Ext.C1 report and oral evidence, it was found that to remove the nuisance, a mandatory injunction is to be granted. Suit was decreed and appellant was directed to cut and remove the three coconut trees. It was challenged before Sub Court, Thalassery in A.S.52 of 1993. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. At the time of admission, notice was issued to respondent to show cause why appeal is not to be admitted. Respondent, though received notice, did not appear. Appeal was thereafter admitted, formulating the following substantial question of law.

Whether courts below were justified in not considering the sufficiency of the protective measures adopted by appellant to prevent nuisance or damage.

5. Learned counsel appearing for appellant was heard. Though notice was served on respondent, she did not appear. Hence respondent called; absent and recorded exparte.

6. The argument of the learned counsel is that courts below did not consider the sufficiency of the protective measures taken by appellant to prevent the nuisance caused and in such circumstances, the decree granted by courts below is unsustainable.

7. Learned Munsiff and learned Sub Judge relied on Ext.C1 report submitted by Commissioner, along with the oral evidence tendered. Ext.C1 report establish that three coconut trees are slanding towards the tiled building in the plaint schedule property belonging to respondent. The report shows that though some preventive measures were taken to prevent the falling of coconuts on the buildings, due to fall of coconuts, parts of the roof were damaged. In fact damage was caused not only to the tiles, but to the rafters also. It is on that basis, learned Munsiff found that appellant is bound to remove the coconut trees and

first appellate court confirmed the same. On the evidence, it is not possible to hold that the slanding coconut trees are not causing nuisance and damage to the tiled building in the plaint schedule property. In fact evidence of Pws 1 to 3, Ext.C1 and to a limited extent, evidence of DW1 establish that fact. In such circumstances, the question is whether a decree for mandatory injunction should be granted.

8. A learned Single Judge of this court in **Manikkam V. Kamala**(1986 KLT 536) considered the right of the owner of a land to get the branches of trees of the neighbouring owner overhanging to his property. It was held that the position has been settled by House of Lords in **Lemmon V. Webb**(1895 I.A.C. 1). It was held that no man has a right to allow the branches of the trees in his land to overhang his neighbour's land and curtail reasonable user of the land and being a continuing wrong in tort, a nuisance is caused and this nuisance could be abated by the owner lopping the branches which extent over his land and if he does not exercise that right, he can very well approach the court to obtain necessary relief of abandoning the nuisance. It was held that the owner of the tree acquired no right over the land of the neighbour simply because the branches

of his trees extended over the neighbouring soil for any continuous length of time and latter does not countenance a prescriptive right to commit and continue the nuisance and therefore a decree for mandatory injunction could be granted. Viewed from that angle, it cannot be said that decree for mandatory injunction cannot be granted.

9. But there is force in the submission of appellant that courts below did not factually consider the sufficiency of the protective measures carried out by appellant. The right of respondent is only to get the nuisance abated. It is not mandatory that trees should be cut and removed as sought for. If by other means, nuisance can be prevented, then a decree for mandatory injunction need not be enforced. But it is for appellant to remove the nuisance caused. In such circumstances, in the interest of justice, it will be sufficient if sufficient provision is made while executing the mandatory injunction sought for. It is made clear that the decree for mandatory injunction granted by trial court and confirmed by first appellate court is subject to the following modification.

10. It is made clear that appellant is entitled to satisfy the executing court, when the decree for mandatory injunction is

sought to be executed by respondent, that sufficient protective measures have been taken to avoid the falling of coconuts or cadgen leaves on the tiled building in the plaint schedule property. It is made clear that in the execution petition, appellant is to satisfy the executing court that nuisance of falling of coconuts or cadgen leaves on the building is abated or prevented by the methods adopted by appellant. If executing court finds that measures taken by appellant are not sufficient, then decree is to be executed and trees are to be cut and removed. With the said clarification, the appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-